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No. 90-1864

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In the Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK STATE DEPARTMENT OF HEALTH,
PETITIONER

v.

JOANNA ANDRULONIS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), protects the federal government from liability for the failure of a federally employed scientist, who was observing an experiment conducted by a state employee in a state medical research facility, to stop the experiment because of safety risks.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A45) is reported at 924 F.2d 1210. The opinion of the district court (Pet. App. A46-A389) is reported at 724 F. Supp. 1421. A related opinion of the district court (Pet. App. A390-A398) is reported at 593 F. Supp. 1336.

JURISDICTION

The judgment of the court of appeals (Pet. App. A401-A402) was entered on March 12, 1991. The petition for a writ of certiorari was filed on June 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Jerome Andrulonis was an employee of the New York State Department of Health, conducting rabies research under the direction of Dr. John G. Debbie. Debbie planned some of his research in collaboration with Dr. George M. Baer, Chief of the Viral Zoonosis Branch and Rabies Laboratory at the Center for Disease Control (CDC), a division of the United States Department of Health and Human Services located in Atlanta, Georgia. This case arises out of an experiment Debbie and Andrulonis conducted in an attempt to produce an oral rabies vaccine that could be administered to animals in the wild. Pet. App. A6-A7.

In order to conduct the experiment, Debbie needed a certain type of rabies virus, which Baer produced and brought to Debbie's laboratory in New York. The experiment involved an attempt to prepare pills coated with the rabies virus. Because the machine used to coat the pills was not entirely airtight, Andrulonis was exposed to the virus. Baer observed the experiment and apparently knew the machine was not airtight, but neither advised the New York scientists that he thought this was abnormally dangerous, nor otherwise intervened to stop the experiment. The lower courts concluded that this incident caused Andrulonis to contract rabies. Pet. App. A9-A10, A12-A13.

2. Andrulonis and his family were unable to sue New York in tort because New York's workers' compensation law provides the exclusive remedy for injuries of this kind. See Pet. App. A181. They did, however, commence this action in the United States District Court for the Southern District of New York, contending that the United States was liable

under the Federal Tort Claims Act (FTCA). The United States brought the State of New York into the suit, contending that New York was responsible for any liability imposed on the United States.[1]

The district court partially accepted and partially rejected the contention of the United States that it was insulated from liability by the "discretionary function" exception to the FTCA set forth in 28 U.S.C. 2680(a).[2] The court refused to impose liability based upon Dr. Baer's decision to encourage and aid the research by New York employees, and concluded that Dr. Baer's duty to warn the New York employees of the specific hazards of the virus he supplied to them was met as of the time he delivered the virus. The court also found, however, that Dr. Baer, on viewing the New York experiment, should have advised that it was being conducted in an unsafe manner, and that the discretionary function exception did not protect the United States from liability for his failure to do so. Pet. App. A260-A262. The district court entered a judgment against the United States for approximately $6.4 million, but held that

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[1] Even though Andrulonis could not sue New York directly because of the exclusivity of the workers' compensation remedy, it was permissible under New York law for the United States to bring a third-party action against New York seeking contribution for any damages imposed on the United States. See Pet. App. A181-A182.

[2] Section 2680(a) provides in pertinent part that the United States is not liable for

> [a]ny claim based upon an act or omission of an employee of the Government * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

the United States was entitled to recover approximately $3.7 million of the judgment from New York because of the State's role in the experiment. Pet. App. A354-A355.

3. On appeal, the court of appeals affirmed the district court's application of the discretionary function exception. The court relied on this Court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), to support the conclusion that the discretionary function exception generally applies only at the level at which policy decisions are made, and not at the level at which those decisions are implemented. Pet. App. A19-A20. It suggested that decisions at the implementation level are protected only if the employees are "specifically empowered to make policy judgments." *Id.* at A21 (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 820 (1984)). Because Dr. Baer's failure to warn of the dangers of the experiment "did not lend itself to policy balancing," and because there was no "indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed," the court concluded that the discretionary function exception should not protect the government. Pet. App. A22.

Finally, the court of appeals rejected the government's argument that this Court's decision in *Dalehite* v. *United States*, 346 U.S. 15 (1953), supported application of the discretionary function exception to conduct at the operational level. The court argued that the only cognizable negligence in *Dalehite* had been at the policy-making level where the program was instituted, so that the Court's decision that the government was not liable in *Dalehite* did not support the government's contention that the discre-

tionary function exception protected conduct at the operational level. Pet. App. A22-A23.

Although it affirmed all other substantive aspects of the district court's decision, the court of appeals reversed a portion of the district court's decision regarding the effect on the damage award against New York and the government of settlements other parties had made before trial. On that issue, the court remanded the case to the trial court with instructions to recalculate the damage award. Pet. App. A33-A41.[3]

ARGUMENT

1. Just two months after the court of appeals issued its opinion in this case, this Court announced its decision in *United States* v. *Gaubert*, 111 S. Ct. 1267 (1991). The decision in *Gaubert* significantly undermines the principal analytical underpinnings of the decision of the court of appeals: that court's expansive reading of this Court's decision in *Indian Towing*, its narrow reading of this Court's decision

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[3] Because the case will return to the district court for modification of the judgment, the case is not final in all respects. This does not affect the jurisdiction of this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 2.2 (6th ed. 1986). It is true that New York or the United States (which did not petition from this interlocutory judgment) could raise the claims presented in the petition New York has filed in another petition seeking review of any final judgment the district court may enter on remand. See *id.* at 41. We believe, though, that the lack of finality should not be dispositive in evaluating the petition in this case, because the proceedings remaining in the district court are unlikely to affect the legal question presented by the petition. Cf. *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953) (expressing a similar view in a case seeking review of the judgment of a state court).

in *Dalehite*, and its application of a distinction between conduct that makes policy and conduct that implements policy. As *Gaubert* makes clear, the court of appeals erred on all of these points.

First, the court of appeals erred in reading *Indian Towing* to support a distinction between the making and implementation of policy. This Court corrected a similar error in *Gaubert*, explaining that the decision under review in that case had "misinterpreted *Berkovitz*'s reference to *Indian Towing* as perpetuating a nonexistent dichotomy between discretionary functions and operational activities." 111 S. Ct. at 1275. As the Court noted, *Indian Towing* has little relevance in this area because the United States in *Indian Towing* "did not even claim the benefit of the [discretionary function] exception." *Ibid.*

Second, the lower court misconstrued this Court's decision in *Dalehite* when it concluded that the only negligence to which that decision had applied the discretionary function exception had occurred at the policy-making level. As this Court explained in *Gaubert*, *Dalehite* involved discretionary actions both in "the cabinet-level decision to institute the * * * program," as well as "the decisions concerning the specific requirements for [implementing the program]." 111 S. Ct. at 1274.

Finally, and most fundamentally, the *Gaubert* opinion shows that the court of appeals erred in suggesting that the government can escape liability for conduct at the operational level only by showing that regulations required the employee to consider particular policies, or that the employee actually considered particular policies, in making the decision in question. As the *Gaubert* opinion explains, the exception protects the government when "established

governmental policy, as expressed or implied by statute, regulation, or agency guidelines, *allows* a Government agent to exercise discretion," because "it must be presumed that the agent's acts are grounded in policy when exercising that discretion." 111 S. Ct. at 1274 (emphasis added). In sum, the issue is not whether the government can prove in each case what policy considerations motivated the action, but "whether [the actions taken] are susceptible to policy analysis." *Id.* at 1275.

Accordingly, we agree with petitioner that this Court's decision in *Gaubert* raises a serious question regarding the accuracy of the analysis of the court of appeals.

2. Nevertheless, we adhere to our view—reflected in our initial decision not to seek review in this case—that this case is not a suitable vehicle for further plenary examination of the discretionary function exception. The decision below was based largely on the relatively unusual and complicated facts of this case, which are far afield from the standard fare of FTCA cases. Because of the unusual facts, we doubt that review of the way in which the discretionary function exception applies here will aid materially in the application of that exception in other cases.

Moreover, because the court of appeals rendered its decision while *Gaubert* was under submission in this Court, that court has not had an opportunity to consider its analysis in light of *Gaubert*. There is every reason to believe that the court of appeals would have analyzed the case differently if this Court's opinion in *Gaubert* had been available at the time the court of appeals decided the case. Thus, there is no reason to review the judgment to ensure that the lower courts apply *Gaubert* in a proper man-

ner; the court below has not yet had an opportunity to apply *Gaubert* at all.

Accordingly, because *Gaubert* seriously undermines the analysis of the court of appeals, we believe it would be prudent and efficient for this Court to allow the court of appeals to consider in the first instance the application of *Gaubert* in this unusual context.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *United States* v. *Gaubert*, 111 S. Ct. 1267 (1991).[4]

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[4] If this Court accepts our recommendation, we believe it would be appropriate, to minimize the risk of confusion, for any order vacating the judgment of the court of appeals expressly to indicate that it is vacating the judgment with respect to both petitioner *and* the United States. Even though the United States did not itself file a petition in this case, peitioner's filing made the United States a party to the case in this Court. Accordingly, we are entitled to the benefit of any substantive relief this Court may grant petitioner. See, *e.g.*, *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 783 n.14 (1980); *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U.S. 297, 302-305 (1983) (holding that a party adversely affected by a lower court judgment from which the party did not petition nevertheless had the capacity, after another party petitioned, to urge reversal of the judgment).

Because the United States still is a party to the case pending in the district court, the government in any event will get the benefit of any order this Court issues that vacates the judgment of the court of appeals with respect to New York. An explicit order vacating the judgment as to the federal government, though, would foreclose any possibility that the law of the case doctrine could be invoked against the United

Respectfully submitted.

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States in the lower courts and would ensure that any new decision regarding the discretionary function exception would benefit the United States, for whose benefit the exception was enacted. Finally, such an order would further judicial economy by rendering unnecessary a separate petition by the government seeking review of any final judgment the lower courts might issue on the *Gaubert* issue, as discussed above, page 5, note 3, *supra*.

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